

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERI YGNATOWIZ and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, DEERLODGE NATIONAL FOREST, Butte, MT

*Docket No. 00-666; Submitted on the Record;
Issued December 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation.

On August 25, 1993 appellant, then a 50-year-old computer clerk, sustained an employment-related cervical strain and lumbar subluxation. She missed intermittent periods of work until she stopped on October 2, 1994. On October 23, 1995 appellant returned to limited duty for three hours a day and stopped again on July 20, 1996.¹

The Office continued to develop the claim and found that a conflict in the medical evidence existed between the opinions of appellant's treating Board-certified family practitioner, Dr. Susan M. Selbach and Dr. Max Iverson, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, regarding whether her diagnosed fibromyalgia condition was employment related. On April 11, 1996 the Office referred appellant to Dr. Ralph Cotton, a Board-certified orthopedic surgeon, who provided reports dated April 23, May 16 and June 20, 1996.

In a November 25, 1996 decision, the Office found that, as fibromyalgia was not an accepted condition, appellant's employment-related conditions had resolved.² Appellant timely requested a hearing that was held on August 4, 1997. At the hearing she testified regarding the August 25, 1993 injury and her current condition and submitted a written statement, medical literature regarding fibromyalgia and additional medical evidence. By decision dated October 7, 1997, an Office hearing representative affirmed the prior decision, finding that the weight of the medical evidence rested with Dr. Cotton, who provided the independent medical evaluation, with regard to whether appellant's accepted conditions had ceased. The hearing representative further found that appellant had not established that her fibromyalgia was employment related.

¹ The record indicates that appellant received compensation through July 20, 1996.

² The record also indicates that appellant filed an emotional condition claim that was denied by the Office.

On September 30, 1998 appellant requested reconsideration and submitted medical evidence. In a December 1, 1998 decision, the Office denied modification of the prior decision, finding that the weight of the medical evidence continued to rest with the opinion of Dr. Cotton. The instant appeal follows.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.³ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.⁴ Moreover, when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report.⁵

The relevant medical evidence includes numerous reports from appellant's treating physician, Dr. Susan M. Selbach, who is Board-certified in family practice, who advised that appellant's fibromyalgia was a result of the August 25, 1993 employment injury. In a report dated March 14, 1995, Dr. Henry W. Busey, a Board-certified internist, opined that appellant had "classic fibromyalgia." By report dated June 15, 1995, Dr. Max Iverson, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, opined that all appellant's complaints were nonemployment related.

In a report dated April 23, 1996, Dr. Ralph Cotton, a Board-certified orthopedic surgeon, who performed an independent medical evaluation for the Office stated:

"I feel that [appellant] has no significant organic findings and to make a diagnosis one would have to put her in a category of fibromyalgia. There are no objective findings."

Dr. Cotton then recommended a complete psychiatric evaluation, along with psychological testing, to determine the cause of her complaints. Following an Office request, in a supplementary report dated June 20, 1996, Dr. Cotton referred the Office to his previous report and again stated that he was not qualified to answer regarding the role of emotional factors on appellant's condition. He again recommended psychiatric evaluation.

³ See *Patricia A. Keller*, 45 ECAB 278 (1993).

⁴ *Roger Dingess*, 47 ECAB 123 (1995).

⁵ See *Talmadge Miller*, 47 ECAB 673 (1996).

Dr. Selbach provided a September 16, 1996 report in which she advised that a diagnosis of fibromyalgia often comes after a traumatic event and concluded that the August 25, 1993 injury triggered appellant's symptoms of fibromyalgia. She noted reviewing Dr. Cotton's reports and advised referral for psychiatric evaluation and to a pain center.

In this case, the Board finds that the weight of the medical evidence regarding whether appellant's employment-related cervical strain and lumbar subluxation had ceased is represented by the thorough, well-rationalized opinion of Dr. Cotton, the independent medical examiner, who provided reports dated April 23 and June 20, 1996 in which he advised that appellant had no objective findings. The Office, therefore, properly terminated appellant's compensation benefits.

The Board further finds that this case is not in posture for decision regarding whether appellant's fibromyalgia is employment related.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had continuing disability causally related to her accepted injury.⁶

In the instant case, the Board finds that a conflict exists regarding whether appellant's fibromyalgia is employment related. Dr. Iverson, who provided a second opinion evaluation for the Office, opined that appellant had no employment-related condition. Dr. Selbach, appellant's treating physician, consistently opined that appellant's fibromyalgia was employment related. Dr. Cotton, who provided an independent medical evaluation for the Office advised that appellant had no objective findings but stated that "to make a diagnosis one would have to put her in a category of fibromyalgia." He further advised that he was not qualified to answer questions regarding the role of emotional factors on appellant's condition and recommended psychiatric evaluation. The case will, therefore, be remanded for the Office to prepare an updated statement of accepted facts and to obtain an independent medical evaluation to determine if appellant's fibromyalgia is an employment-related condition. After such development as it deems necessary, the Office shall issue a *de novo* decision.

⁶ See *George Servetas*, 43 ECAB 424 (1992).

The decision of the Office of Workers' Compensation Programs dated December 1, 1998 is hereby affirmed in part and vacated in part and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
December 19, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member